FILE COPY

MAY 4 1942

CHARLES ELMORE CRO

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 1212

EDGAR BOHN,

Appellant,

vs.

MRS. ELIZABETH WEST BOHN.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

APPELLANT'S BRIEF IN OPPOSITION TO THE MOTION TO DISMISS OR AFFIRM.

HANUN GARDNER,
J. F. GALLOWAY,
OSCAR BACKSTROM,
Counsel for Appellant.

INDEX.

Subject Index.

	Page
Appellant's brief in opposition to the motion to dismiss or affirm	1
Statement of facts	1
Contentions of the parties	2
Argument	2
The Federal question	4
Discussing in detail the objections in motion to dismiss	8
Exhibit "A"—Notice to appellee under paragraph 3 of Rule 12 and affidavit in support thereof	11

Table of Cases Cited.

Castillo v. *McConnico*, 168 U. S. 680	4
Hauer v. *Davidson*, 113 Miss. 696, 74 So. Rep. 621	3

Statutes Cited.

Constitution of the United States, 14th Amendment	4, 8
Mississippi Code of 1880, Section 1170	2, 3, 4
Mississippi Code of 1930:	
Section 1404	5
Section 1410	5
Section 1412	6
Section 1765	6
Rules of the Supreme Court of the United States, Rule 12, par. 3	9
United States Code Annotated, Title 28, Section 350	9

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 1212

EDGAR BOHN,

vs. *Appellant,*

MRS. ELIZABETH WEST BOHN,

Appellee.

BRIEF BY APPELLANT ON MOTION TO DISMISS APPEAL.

MAY IT PLEASE THE COURT:

Statement of Facts.

One Henry Bohn, a resident of the City of Pass Christian, Harrison County, Mississippi, died intestate at his usual place of residence in that city in 1928, and left surviving him, as his legal heirs, two children by a former marriage, and appellee, his surviving widow. Appellant is one of his surviving children, and a short time after death of the father, he bought out the interest of his sister, the other child; there were no children by the second marriage.

Shortly after the death of Henry Bohn, the surviving widow and two children occupied the homestead property together, but using separate parts thereof, according to a common understanding and plan of action, which continued up to the filing of the present suit, initiated in the circuit

court of Harrison County, Mississippi, as an action of ejectment, and involving a claim for accrued rents, claimed to be due the surviving widow, from the date of the death of the husband and father, until payment in full, covering a period of more than ten years, not including rents accruing since filing the suit.

Contentions of the Parties.

Appellees contend, and base their suit on it, that the surviving widow, under the above facts, under the laws of the State of Mississippi, has a life estate in the property involved in this suit, which was occupied by the said Henry Bohn during his lifetime, as his homestead; and therefore, she has the right to the exclusive use and occupation of the property, and its income, rents and profits.

On the other hand, appellant contends, that since the adoption of the Code of 1880 in Mississippi, life estates in the surviving husband or wife were abolished, and, in lieu thereof, they were given the status of tenants in common, with a veto power on the part of the surviving spouse, over the sale or partition of the homestead.

ARGUMENT.

The life estate, which vested in the surviving widow, from the time of the admission of the State of Mississippi into the Union, up to the year 1880, was abolished upon the adoption of Section 1170 of the Code of 1880, which is as follows:

> "Dower and curtesy, as heretofore known, are abolished."

The legislature of the State of Mississippi has never restored the right of dower in the surviving widow, to this date.

The legislature of the State, in 1880, had come to a realization, as had most of the law making powers of the other states of the Union, including lawyers, judges and litigants that the attaching of dower upon the lands of a man by his marriage, was so inconvenient, and in many cases worked such hardship, that it was necessary to adopt different methods entirely.

One of the older lawyers of the state, who had practiced long under the ancient system, after the enactment of Section 1170 of the code of 1880, composed the following obituary:

> "Venerable relics of antiquity, you have come down to us from a former generation. You have survived the wrecks of empires, and change of dynasty. Born way back in the womb of time, whereof the mamory of man runnith not to the contrary, you have outlived the War of Roses, passed safely through the protectorate, crossed the ocean, survived the great American Revolution and rode out the storm of the late great war, like shades, you have followed the bride and groom, twain blended into one. Venerable priests and priestess of the common law, farewell. You have been pleasant in your lives and in death, you have not been divided."

Also, in the case of *Hauer* v. *Davidson,* 113 Miss. 696, 74 So. Rep. 621, the Supreme Court of the State of Mississippi referred to the fact that courtesy and dower had long since been abolished in this state, in the following words:

> "There is no merit in this contention, for the reason that the estate by courtesy was abolished in 1880 prior to the death of Mrs. Branon. On her death, her husband and daughters inherited the land as tenants in common, so that a conveyance thereof by Branon would vest in his grantee, an undivided interest therein."

The Federal Question.

If dower, a life estate in the surviving widow, was abolished by the Mississippi Legislature in 1880, and there has been no act of the Legislature reinvesting the surviving widow with that right, then the action of the Supreme Court in holding that the surviving widow has a life estate in the homestead property of the deceased husband, is unlawful, and has operated to deprive appellant of a valuable right in the homestead property of his father, vested in him under the statutes which have been quoted at length in appellee's brief to dismiss herein, and which statutes are the only laws of the State of Mississippi which are applicable to the matter.

In other words, the vesting, without the benefit of legislature, of a life estate in the surviving widow, in view of said statutes, is a violation of the Fourteenth Amendment to the Federal Constitution, and operates to deprive appellant of his property without due process of law.

It is not a question of the interpretation of the Statutes of the State of Mississippi, but the application of the Statute by the Mississippi Court. This Court, in the case of *Castillo* v. *McConnico*, 168 U. S. 680, and on page 683, clearly draws the distinction:

> "The two are neither correlative nor coterminous. The first, due process of law, must be found in the state statute, and cannot be departed from without violating the constitution of the United States. The other depends on the law making power of the state, and, as it is solely the result of such authority, may vary or change, as the legislative will of the state see fit to ordain. It follows that to determine the one, due process of law is the final province of this court, while the ascertainment of the other, that is, what is merely essential under the state statute, is a state question within the jurisdiction of the state courts of last resort.

When, then, a state court decides that a particular formality was or was not essential under the state statute, such decision presents no Federal question, *provided always the statute as thus construed does not violate the Constitution of the United States, by depriving of property without due process of law*" (Italics ours).

Now the statutes, construed by the Supreme Court of the State of Mississippi, are as follows: (*Code of 1930*)

"1404. *Descent of property as between husband & wife.*—If a husband die intestate, and do not leave children, or descendants of children, his widow shall be entitled to his entire estate, real and personal in fee simple, after payment of his debts; *but where the deceased husband shall leave a child or children by that, or a former marriage, or descendants of such child or children, his widow shall have a child's part of his estate, in either case in fee simple.* If a married woman die, owning any real or personal estate, not disposed of, it shall descend to her husband, and her children, or their descendants, if she have any surviving her, either by a former husband or by the surviving husband, in equal parts, according to the rules of descent. And if she have children, and there also be, descendants of other children, who have died before the mother, the descendants shall inherit the share, to which the parent would have been entitled, if living, as co-heirs with the surviving children. But, if she have no children, or descendants of them, then the husband shall inherit all of her property" (Italics ours).

Thus, the children of the deceased, and the surviving spouse, took share and share alike.

"1410. *Descent of exempt property.*—The property, real and personal, exempted by law from sale under execution or attachment, shall, on the death of the husband or wife owning it, *descend to the survivor of them, and the children and grandchildren of the decedent, as tenants in common,* grandchildren, inheriting their deceased parent's share, and if there be no children or

grandchildren of the decedent, to the surviving wife or husband, and if there be no such survivor, to the children and grandchildren of the deceased owner; but where the surviving husband or wife, shall own a place of residence equal in value to the homestead of the decedent, and the deceased husband or wife, have not surviving children or grandchildren of the last marriage, but have children or grandchildren of a former marriage, the homestead of such decedent, shall not descend to the surviving husband or wife, but shall descend to the surviving children or grandchildren of the decedent by such former marriage, as other property" (Italics ours).

The property exempted from sale under execution or attachment, is defined: (Code of 1930)

"*1765. Homestead exemption.*—Every citizen of this state, male or female, being a householder, and having a family, shall be entitled to hold, exempt from seizure or sale, under execution or attachment, the land and buildings owned and occupied by him or her, as a residence, but the quantity of land shall not exceed 160 acres, nor the value thereof, inclusive of improvements, save as hereinafter provided, the sum of Three Thousand ($3000.00) Dollars, but the husband or wife, widower or widow, over sixty years of age, who has been exemptionist under this section, shall not be deprived of such exemption because of not having a family, or not occupying the homestead."

"*1412. Exempt property not to be partitioned in certain cases.*—Where a decedent leaves a widow to whom, with others, his exempt property, real and personal, descends, the same shall not be subject to partition or sale for partition during her widowhood, as long as it is occupied and used by the widow unless she consents."

This last section, without otherwise change of the rights of the surviving widow and children of the decedent, thus gave the widow the veto power, *only*, over the sale or par-

tition of the homestead property. And that is the same right that a wife has in Mississippi, over the homestead property during the lifetime of the husband—neither more nor less.

A casual reading of the foregoing statutes, shows that the surviving widow is a tenant in common with the surviving children in the homestead property, and is not the owner of a life estate therein, as the court held.

To hold otherwise, is to judicially legislate an estate of tenancy in common, into an estate for life.

The wrong and inequity of such a misapplication of the statute, will appear from the following illustration, and it is not a fanciful one, or one not likely to happen:

A husband having a child by a former marriage, in late life, marries a young woman. A short time thereafter, he builds a hotel at a cost of three quarters of a million dollars. The husband resides on the property with his second wife, occupying several rooms in the building. The child by the former marriage does not reside with her parent, she has now reached her majority. There is a sort of armed neutrality between the stepmother and the child. Both of them are fond of the father and husband, but are jealous of each other; the wife is of the possessive type, so that there is no possibility of any real friendship between them. The wife is not much older than the child, so that her expectancy is much longer than that of the husband.

The hotel property is valuable and productive of a large revenue. In case of the death of the husband, which must occur in a few years according to the course of nature, the holding of the court will exclude this child from participation in the use and benefits of this most valuable property, unless the widow consents to sale or partition, or dies.

A number of other such conditions will readily appear to the mind of the Court.

Discussing in Detail Objections in Motion to Dismiss.

As to paragraph 1 of the motion.

The Federal question is, as we have hereinbefore stated, the Supreme Court of the State of Mississippi has no authority to convert an estate of tenancy in common, into an estate for life, without depriving appellant of the use of his property, without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States.

As to paragraph 2 of the motion.

Subsections a-b and c have already been discussed. As to subsection d:

On page 1 of the "Statement of the Case" filed by appellant in his petition for appeal, it is there stated: "The case was appealed to the Supreme Court of the State of Mississippi and the judgment of the lower court was affirmed. Thereupon, appellant filed suggestion of errors to this decision, and argued fully and at length that the decision was contrary to the Fourteenth Amendment to the United States Constitution."

It was set up in the suggestion of errors before the state supreme court:

> "The application given by the court to Section 1410 and 1412 of the Mississippi Code of 1930, has deprived appellant of a valuable right guaranteed by the Fourteenth Amendment to the U. S. Constitution."

And appellant, and counsel for appellant, submitted to the court a brief, containing thirteen pages on that point alone, reviewing the law and the authorities thereon.

As to subsection g, to the effect that appellant's statement filed in connection with the application for appeal,

did not contain a copy of the opinion of the court below. Counsel for appellees are mistaken, as will be readily seen in the transcript of the record filed in this Court.

As to paragraph 3 of the motion.

The assignment to the effect that appellant failed to serve appellees with the notice required by paragraph 2 of rule 12, directing attention to paragraph 3 of rule 12:

Counsel for appellee are mistaken as to this again, as will more fully appear from the transcript of the record herein, and also from a copy of said notice, which was served upon counsel for appellees the same day that the petition for appeal, statement of the case, copy of order of the court granting the appeal, and bond etc., were served upon them, jointly and severally. Attached to this brief is copy of this notice calling attention to the rule referred to, as Exhibit "A" hereto.

As to paragraph 4 of the motion.

The appeal in this case was perfected within the ninety day period, provided for by the statutes, Section 350, Title 28, U. S. Code Annotated. In fact the appeal was perfected in one-third of that time, and as speedily as it could be done under all of the circumstances.

The petition for appeal and all other necessary papers had been prepared, within a short time after the decision in the state court, but the making of the bond and its approval required about ten days.

It is therefore submitted that appellant has been reasonably diligent, no injury has been done, and he has only exercised the right conferred upon him by the statute aforesaid.

As to paragraph 5 of the motion.

The bond for appeal, with supersedeas, has been approved by Chief Justice Sydney Smith of the Supreme Court of the State of Mississippi, and is in due and regular form.

The bond is entirely sufficient in every respect, otherwise Judge Smith would not have approved it, but if deemed insufficient by this Court, appellant will be glad to make it satisfactory.

As to paragraph 6 of the motion.

This is upon the assignment that the appeal is prosecuted by appellant solely for the purposes of delay.

This statement is purely gratuitous.

We have prosecuted this appeal only after considerable deliberation, and with the confident belief that the decision of the Mississippi Supreme Court should be reversed; and that the Federal Constitution will protect appellant in his rights of property in this case.

Respectfully submitted,

HANUN GARDNER,
Counsel for Appellant.

J. F. GALLOWAY,
OSCAR BACKSTROM,
Of Counsel.

EXHIBIT "A".

Office Phone
Gulfport 590

Residence
Pass Christian, Miss.

JAMES F. GALLOWAY

Lawyer,

Hatten Building

Gulfport, Miss.

March 18, 1942.

Messrs. Thompson & Mize,
Jo Drake Arrington,
Attorneys,
Gulfport, Miss.

RE: Bohn vs. Bohn #34,766
Docket Mississippi Supreme Court

GENTLEMEN:

In connection with the above matter, I beg to call your attention to Sub Section 3 paragraph 12 of the Revised Rules of the Supreme Court of the United States, adopted February 13, 1939 as amended March 25, 1940, October 21, 1940 and May 26, 1941.

Yours very truly,

(Signed) J. F. GALLOWAY.

JFG:kg.

STATE OF MISSISSIPPI,
County of Harrison:

This day personally appeared before me, the undersigned authority in and for the said county and state, the undersigned, J. F. Galloway, who being by me duly sworn deposes and says that on March 18, 1942, he mailed to Messrs. Thompson & Mize and Jo Drake Arrington, attorneys of record for appellee, postage prepaid, addressed to said attorneys at their place of residence, usual abode and place

of business at Gulfport, Mississippi, with return address on the envelope in case of non-delivery. That said letter, or notice, has not been returned to your affiant.

J. F. GALLOWAY,
Affiant.

Sworn to and subscribed before me this the 9th day of April, A. D. 1942.

[Seal Chancery Court of Harrison County, Mississippi.]

C. J. DARBY,
Chancery Clerk,
By L. H. WILLIAMS,
D. C.